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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1142

ANNIE MAE HARRIS, *et al.*,

Petitioners,

v.

CAFRITZ MEMORIAL HOSPITAL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Annie Mae Harris, mother and next friend of Michael Harris, infant, pray that a writ of certiorari be issued to review the judgment of the District of Columbia Court of Appeals.

OPINION BELOW

The opinion of the court of appeals is annexed hereto (*infra*, page 1a).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on September 20, 1976. On December 16, 1976, Mr. Chief Justice Burger extended the time for filing a petition for certiorari herein to and including February 17, 1977.

QUESTIONS PRESENTED

(1) Whether the trial judge's dismissal of the infant petitioner's medical malpractice suit arbitrarily deprived petitioners of their federally protected right to due process of law within the meaning of the 5th and 14th Amendments.

(2) Whether, where the record here affirmatively discloses that the facts in the case are in open dispute and the evidence adduced at trial clearly and sharply conflicting, the trial judge's arbitrary dismissal of the infant petitioner's medical malpractice suit deprived petitioners of their federally protected right to trial by jury in contravention of the 7th and 14th Amendments.

(3) Whether the court of appeals committed reversible error in utilizing the doctrine of *res ipsa loquitur* to affirm the judgment of the trial court.

CONSTITUTIONAL PROVISIONS INVOLVED

5th *Amendment, Constitution of The United States,* provides, in pertinent part, as follows:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

7th *Amendment, Constitution of The United States,* provides, in pertinent part, as follows:

> "In suits at common law, where the value in controversy shall exceed $20 dollars, the right to trial by jury shall be preserved . . ."

14th *Amendment, Constitution of The United States,* provides, in pertinent part, as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case was commenced as a medical malpractice action in the superior court of the District of Columbia. The malpractice, occurring in 1972, resulted in the extensive and frightful disfigurement of its victim, 18-month infant Michael Harris. Michael's mother, Annie Mae Harris, instituted the malpractice action against respondents Cafritz Memorial Hospital and one Dr. Basdeo Balkissoon for the damages sustained by her infant son. In due course, during May 1975, the case was tried to a jury pursuant to petitioners' demand for jury trial. At the close of petitioners' (plaintiffs) case-in-chief the trial judge, wrongfully ignoring the total evidence presented during trial, directed a verdict in favor of respondents (defendants) and entered judgment accordingly. On appeal, similarly ignoring the total evidence presented at trial, the

District of Columbia Court of Appeals affirmed the Judgment of the superior court utilizing the doctrine of *res ipsa loquitur* erroneously to achieve such result.[1]

The following is a fair and complete summary of all "*testimony evidence*" adduced at trial, wholly supported by the trial transcript.* Such summary is presented to correct the erroneous statements, misstatements and numerous omissions, concerning and with respect to the "*testimony evidence*," reflected by and in the PER CURIAM opinion and decision of the District of Columbia Court of Appeals (pp. 1a-6a) in our instant case.

Summary of "*Testimony Evidence*"

On July 17, 1972, at approximately 5 p.m., petitioner Michael Harris (hereinafter referred to as the infant), who was then about age 18 months, suffered burns about the left hand occasioned by hot water. The infant was taken to respondent Cafritz Memorial Hospital (hereinafter referred to as the Hospital), Washington, D.C., and delivered to the Hospital's Emergency Room for treatment, arriving there at approximately 5:30 p.m. At about 8 p.m., or shortly thereafter, petitioner Annie Mae Harris (hereinafter referred to as the mother) arrived home from work. She was told that the infant had been burned about the hand and had been removed to the Hospital. Proceeding to the Hospital she found the infant in the Emergency Room crying (Tr. 12-13).

[1] Although the District of Columbia Court of Appeals announced the rule that the evidence to be considered on appeal in such actions is to be viewed in a light most favorable to the plaintiffs, its *per curiam* opinion (oddly and painstakingly) detailed and recited the "*testimony evidence*" *in a light most unfavorable* to the plaintiffs. See *Per Curiam* Opinion, pp. 2a-3a, 5a-6a.

* The trial transcript is available in the office of the Clerk of this Court.

There the infant received emergency treatment. The mother was asked by a doctor (not respondent Balkissoon) to relate "*What happened*" to cause the injury, to which the mother responded by relating what had been told to her. The doctor administered a drug to the infant. The doctor (not respondent Balkissoon), believed to be the same physician who had administered a drug or shot to the infant, took "*scissors and cut some of the skin from (the infant's) fingers*" (Tr. 14). The physician in question was presumably a staff doctor assigned to the Emergency Room. At the specific direction of the nurse in the Emergency Room, the mother took the infant "*upstairs to a room*" and she remained with him "*there until about 10:30 (p.m.)*" and then went home for the evening (Tr. 15).[2] (All emphases supplied).

During the time the infant and the mother were together in the "upstairs room," *nothing was done for the infant;* no procedures were instituted or performed. Nor did the mother remember anything being done for the infant's condition from the time that she "*left and the time that (she) returned the next day . . .*" *and no one told her "anything regarding what had been done . . .*" if anything (Tr. 15). (Emphases supplied).

The record here discloses that prior to the skin graft operation, neither the respondent doctor nor the respondent Hospital advised or informed the infant's mother that such an operation was contemplated or going to be performed, or even necessary (Tr. 15). The mother's testimony reveals that when she returned to the Hospital at

[2] There is no testimony that the mother either saw or conversed with respondent Balkissoon on July 17, 1972. However, Dr. Balkissoon testified that he saw the infant at the Hospital on July 17, 1972, but could not recall the time of day; nor did his record reflect the time of day the infant was seen by him (Tr. 57-58).

a later time "they had done the skin graft" (Tr. 16) and that no "doctor or a nurse or any Hospital official ever (had) a conference with (her) and (told her) what was going on or what (she) should do" (Tr. 17). When asked on cross-examination if the respondent doctor had kept her informed generally of "what he was doing and the child's progress with his hands?" the infant's mother replied, "No." (Tr. 33)

The record also divulges the fact that Dr. Balkissoon was not formally employed by the infant's mother to perform the graft operation or to medically treat the infant's injuries. Actually, it was one of the Hospital nurses who assigned the infant's case to Dr. Balkissoon and arranged the infant's admission with Dr. Balkissoon over the telephone (Tr. 25).

During the presentation of the plaintiffs' case-in-chief the mother testified that when the infant was discharged from respondent Hospital on September 10, 1972, his left hand was *encased in a flat, fingerless hand-shaped "plastic-like thing"* ("*it was not separating the fingers*") and that movement (*without specifying the degree*) could be effected (Tr. 18).[3] (Emphasis supplied). The witness also testified that 8 months after his discharge remedial surgery was performed on the infant's hand at Children's Hospital which removed some of the webbing from between the fingers, thus enabling him to open his fingers wider than on the date of his discharge from respondent Hospital (the infant's hand and fingers were shown to the jury

[3] These are factual questions obviously confided exclusively to the province of the jury and involve credibility of evidence and witnesses.

and the extent of "*finger motion*" of which the infant was capable was exhibited to the jury (Tr. 19-21).[4]

On direct examination during the plaintiffs' case-in-chief, the infant's mother testified that she observed the infant's left thigh from whence the skin had been removed for the skin graft operation, and that the donor site was suffused with numerous spots which "*are big and lumpy.*" (The witness indicates area as her son is displayed in front of each juror.) (Tr. 16) (emphasis supplied). On rebuttal, the witness testified that she examined the infant after he had been discharged and "After I got home" (Tr. 89), that upon looking at his *thigh* she found "*The scar and the keloids had already formed on the scar (tissue) when I got him home*" (Tr. 89-90, 93). (Emphasis supplied). She also testified that after checking the infant's injured hand it was found that "*His fingers were already grown together and they were down something like this (indicating)*" (Tr. 90),

[4] This testimony does not in any manner constitute a contradiction of the witness' subsequent testimony on rebuttal. Nowhere in her rebuttal testimony does the witness testify that the fingers were immobile or could not move. Indeed, there is no such testimony in the trial record of this case – no witness testified that the infant could not move any of his fingers. There was testimony that the skin graft had healed, that the fingers were all stuck together (testimony of the 15-year old witness) (Tr. 44). But none of such testimony resolves itself into a declaration that the infant could not move any one or all of his fingers. Counsel for the plaintiffs went to great pains to see that all of the facts pertaining to the case, and which were known to him during trial, were brought to the attention of the trial court and jury, including the remedial surgery performed on the infant's hand 8 months after his discharge. All of this clearly refutes the unfounded conclusion of the court of appeals that the hand (or) fingers "*was in an immobile condition, similar to that at the time of trial.*" See page 3a, *Per Curiam* Opinion. (Emphasis supplied.)

that the fingers were bent, that the *skin graft had healed* on the fingers, that the *fingers were not separated,* that there was *no cotton between the fingers,* and that there was *no bandage, except "the thing"* or item referred to as "*the splint*" or as *the "plastic-like thing"* referenced to on page 6, *supra* (Tr. 90, 91, 92, 93).[5] (Emphases supplied).

[5] In its *per curiam* opinion (pp. 2a-3a), the District of Columbia Court of Appeals erroneously avers that, "Appellant *first testified* that when Michael left Cafritz Hospital, *his hand was in a splint* . . ., that his hand *had not healed* . . ." (Emphasis supplied). Actually, the trial transcript affirmatively shows that the witness "*first testified*" (and her testimony was never retracted) that when she took Michael home from the Hospital his hand was encased in a "*plastic-like thing*" (for want of a better description, since she did not know what to call it – splint, bandage or something else) (Tr. 17-18), that "His hand was like this (indicating), but it didn't heal up good yet" (Tr. 18). (Emphases supplied). The injured hand and its members were observed by the jury. It appears from her testimony that the witness is calling the court's and jury's attention to the "*bad job*" (Tr. 37) done to the infant's hand and thigh and to the respondents' "*failure to completely straighten*" *out the infant's fingers (as noted in the testimony of Mrs. Littleton* (Tr. 47)). If any amplification is needed see *footnote* 4, *page* 7, *supra.*

The point to be noticed in our instant case is that the *per curiam* opinion utilizes pure semantics in its unfair analysis and review of the evidence with a propensity to consider the evidence in a light most unfavorable to the plaintiff. This is buttressed by the fact that although Dr. Balkissoon testified that *when he last saw the infant on the date of discharge* from the Hospital, *Michael's hand "had a perfect condition. His fingers looked well as they possibly could*" (Tr. 67-68); nevertheless, and despite the fact that the respondent doctor repeatedly testified that the hand had "*healed,*" the *per curiam* opinion selected that segment of the evidence considered most unfavorable to the plaintiffs to announce that Dr. Balkissoon testified "*that the child's hand had not completely healed when he was discharged*" (*per curiam* opinion, page 3a). (Emphasis supplied).

(cont'd)

Shortly after the infant's discharge from the Hospital, his mother received a bill from respondent Hospital for Six Thousand Dollars ($6,000.00) for services allegedly rendered in connection with his "medical care and treatment" during his stay in the Hospital. She was not seen by any social service people connected with the Hospital (Tr. 30-31). Although she was told to bring the infant back to the Hospital at intervals for further treatment, she was not about to do so because of the "*bad job*" done on the infant's hand by the respondents (Tr. 37). The mother did follow the instructions of Dr. Balkissoon to "*soak*" the infant's hand and fingers "*in warm water and try to straighten them out,*" which she did at home at regular intervals, including attempts

5 (cont'd)

Although the evidence adduced at trial plainly identifies and labels this case as a simple run-of-the-mill skin graft project, the *per curiam* opinion elevates it to an involved medical extravaganza broadly announcing (without a scintilla of evidence in the record to support it) that "sophisticated, complex and continuing treatment is involved in restoring severely burned skin tissue, particularly on an infant" (*per curiam* opinion, page 5a). See testimony of Dr. Balkissoon for the relative simplicity of the graft operation in our instant case (Tr. 59, 69, 70, 73, 75).

It is quite apparent from the record here that the evidence produced at the trial is *ample and sufficient and the case should have been given to the jury under appropriate instructions,* particularly *since virtually all of such evidence involves the question of its credibility.* Manifestly, the major portion of the evidence adduced *subter* has been ignored by the *per curiam* opinion and accorded, as it were, "*the silent treatment.*" Certainly, on the *mandatory due process of law record,* as made and now before us, *no expert testimony was needed to enable the jury to reach a fair, intelligent and lawful verdict* in this case. *However, if any expert medical testimony were needed to assist the jury in arriving at such a verdict, the self-serving testimony of Dr. Balkissoon meets and supplies every foundational requirement for the proper application herein of the salutary doctrine of res ipsa loquitur.*

to "*flex*" the infant's fingers, but that none of these things did any good (Tr. 28, 29, 91).

At trial, Clarrisa Harris, age 15 years, and Eva Littleton (the infant's grandmother) testified on behalf of the plaintiffs. Both supported the testimony of the infant's mother with respect to the condition of the infant's left hand and fingers at the time he was discharged from respondent Hospital.

Clarrisa Harris testified that she understood the word "*splint*" to mean "Something that you *put* in *between your fingers*" (Tr. 44) (emphasis supplied), and that the infant did not in fact have any such device on his hand. Obviously, what counsel for respondent was pleased to call "*a splint*" became, in the eyes of the witness, simply a bandage, inasmuch as such gauze covered the fingers which "*were all stuck together*" (Tr. 44). (All emphases supplied). It is significant to note that the witness did not testify that the infant could not move his fingers or any of them.

Eva Littleton testified, during the plaintiffs' case-in-chief, that she visited the infant at the Hospital a week after his hand was injured by hot water (Tr. 46, 48), that "*When I went into the Hospital they had his hand wrapped and they had on his hand this little thing with all his fingers wrapped together*" and that *there was nothing between each finger to separate one finger from the other* (Tr. 46). (Emphasis supplied). Witness Littleton also testified that she observed the *condition of the infant's hand on the date he was discharged from the Hospital,* inasmuch as she had taken the infant's mother to the Hospital "*to pick him up,*" that "*the hand was sort of bent like this (indicating) . . . but it wasn't completely straightened out . . . but there wasn't anything between the fingers and they was together*" (Tr. 46-47). (All emphases supplied).

Witness Littleton also testified that at a later date the infant had undergone surgery at Children's Hospital where "They cut the skin that held his fingers together like this. . . . So he could straighten his fingers out a little bit like this. (indicating)." (Tr. 47-48, 51-52) (Emphasis supplied).

Mrs. Littleton gave considerable testimony concerning the horrible, painful keloids which she observed both on the thigh and fingers of the infant after his discharge from the respondent Hospital (Tr. 48-50). In describing the keloids she testified, "*I call them blisters. That's what they look like.* When they grafted the skin to put the skin on his hand he got these sort of blisters" (Tr. 49). She also testified that the keloids have remained on the infant's thigh after and ever since he was brought home from said Hospital (Tr. 49), that "I kept him some nights and they (the keloids) would itch him and he would wake up crying and he would scratch at them" (Tr. 49). When asked by counsel if the keloids bothered the infant's hand, Witness Littleton testified, "It certainly did and he would scratch at it. During the times that I kept him, sometimes pus would run out" (Tr. 49-50). It should here be noted that the witness did not testify that the infant could not move his fingers or any of them. It should also be noted that at no time during her testimony did she mention the word "*splint.*"

The last witness to testify during the case-in-chief was Dr. Basdeo Balkissoon (hereafter sometimes referred to as the respondent doctor) who was duly qualified as a medical expert and was also one of the defendants in our instant case (Tr. 4, 56-57).

Dr. Balkissoon testified that he was a specialist in surgery; that his first contact with the infant was at Cafritz Hospital in the Pediatric Department on July 17, 1972;

the Pediatric Department and the Emergency Room "*are a part of Cafritz Hospital*" (Tr. 57-58). (Emphasis supplied). He was unable to recall and his records did not reflect the time of day when he first saw the infant. However, when seen, the infant had burns on the dorsal of the left hand, which involved the index finger, middle finger and little finger; no cuts were noticed, "*only burns.*" The burns were "*mostly first and second* and some *third degree*" (Tr. 58-59). (Emphases supplied).[6]

Delineating the type of treatment which he claims to have selected and procedures followed in performing the skin graft and follow-up care in this case, the respondent doctor avers substantially as follows:

In order to lessen the loss of skin, which the infant may have suffered, Dr. Balkissoon selected for the skin grafting process (what is known in the profession as) "the open treatment," "Where you keep the hand open most of the time and you cleanse it with antiseptic solution and antibiotic solution. The one that I used is called sulfa-mylon (*the antiseptic and antibiotic solutions used in the "open treatment"*). This has the advantage of preventing maceration of the skin and it is continuously open so that any secretion is out immediately so the wound has the best chance to heal" (Tr. 59-60).

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[6] In describing the degrees of burns, Dr. Balkissoon testified that a "minimum burn is called a first degree burn. A second degree is of course in between. The third degree burn means the skin is lost and more than likely the person will need skin grafting." However, in his testimony concerning "*lost of skin,*" respondent doctor omitted to mention that one of the staff physicians utilized a pair of scissors to cut skin from the infant's fingers while in the Emergency Room. See page 5, *supra.*

"I think that after about 17 days I did the grafting. He was admitted on the 17th and it took a while to try to get that area cleaned up so that the graft would take. If there is any infection still present the graft will not take and the infection would destroy the new skin graft" (Tr. 60). He examined the infant every day, including his thigh. The graft looked good and looked like it would do as other skin grafts, both the hand that was treated and the thigh (Tr. 61).[7]

The mother was instructed to bring the infant to the Hospital every day "because Dr. Pavot wants these children to come back every day." Doctor Pavot is the Chief of Physical Medicine at Cafritz Hospital (Tr. 61). That was one, to come back every day. Second, she was to soak his hand in luke-warm water and make him bend and extend the fingers because it needed physical therapy. We called her several times before but she never came. "I never spoke to her (the infant's mother)," but "I would speak to her little girl instead" (Tr. 62).

"I imagine (the charges for my service) was something like $470.00" (Tr. 66). I would have made a house call if Mrs. Harris had told me she couldn't come (Tr. 65-66).

When I received a letter from plaintiffs' counsel I was shocked because I thought that Michael must be doing fine. When I left Michael he had a perfect condition (Tr. 67).

The actual grafting technique utilized appears on page 69 of the Reporter's Transcript.

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[7] The infant was also treated by the open treatment method *after the graft was taken* (Tr. 60).

Michael was seen by me on the day and date that he was discharged from Caftitz Hospital. I *rebandaged his left hand,* "but as I remember the child did not need too much bandaging of the graft at that time *and the graft had healed*" (Tr. 73). "He needed something to *support* the splint. . . . We didn't have much bandaging of the fingers because it *didn't need any covering*" (Tr. 73-74).

"I said that on the date of his discharge the infant's graft had healed very well. Grafts of this kind usually heal in about a week. The graft in this case was done on August 3 and by the 10th of August, "it was long on the way to healing." And "by the time of discharge it was pretty much healed up" (Tr. 75). Discharge was 5 weeks after surgery.

Since the graft was *healed* I would say that "*it is sort of a medical neglect* and is not the doctor's fault or the hospital's fault. I think it is the family's fault. With the child's hand still and the fingers together, if there are any *raw surfaces* between the fingers they would tend to stick if they are not made to move and this is my *theory* of what happened in this instance" (Tr. 76). (Emphasis supplied).

"*I was in a state of shock*" when I found out and became aware that the child's hand was in the *condition* which appears here in this court (Tr. 77). (Emphasis supplied).

After examining the infant's thigh here in court I would say that Michael has formed a keloid and that "*the whole area is kelodial with keloid tissue. It is called keloidosis.*" He has keloids on his left hand as well (Tr. 81). (Emphasis supplied). He (the infant) was a keloid former. Even

so, "*I would still have to take the graft, but I would take special precautions and I might have done things to prevent keloid* formation with maybe X-ray treatment" (Tr. 81-82). (Emphasis supplied).

The infant, Michael, was discharged from Cafritz Hospital on the 10th of September, I believe, *either the 9th or the 10th.* I would say that when the infant was released that he had a bandage on which would be holding a splint in place on his left hand, *because I "would have bandaged* the child before he left *either the day before or the morning that he left"* (Tr. 85). (Emphasis supplied). Compare Tr. 84.

I *usually* bandage the infant's hand myself. "*But when he went to physical therapy they would put it on. The infant went to physical therapy daily*" (Tr. 86). (Emphasis supplied).

It is possible that I did not bandage the infant's hand before he was discharged. I don't remember seeing any keloid formation on the infant either prior to or at the time he was discharged. As far as I remember the infant had cotton between his fingers on the left hand when discharged (Tr. 84).

Observations and disposition of case by trial judge and court of appeals

Immediately following the testimony of witness Littleton, counsel for plaintiffs proffered a report and two bills to the trial judge for acceptance as evidence in the case. One of the bills was from Children's Hospital for surgery performed on the infant's left hand to correct the conditions which plaintiffs allege were acquired at and in respondents' Hospital (Tr. 52). The trial judge refused to

allow this, stating, "But that's not a part of this case. Case is against the Cafritz Hospital" (Tr. 52).

There followed a lengthy colloquy between the trial judge and plaintiffs' counsel regarding the admission of Children's Hospital records into evidence which pertained to the corrective surgery performed on the infant's left hand some time subsequent to his discharge from Cafritz Hospital. Portions of the colloquy are set forth at random, as follows:

> "MR. DAVID (referring to the above-quoted remarks of the trial judge): Of course it is, but we can show what was done at Children's Hospital to correct that done at the Cafritz Hospital. * * * The boy's condition speaks for itself . . . A child with a burned two fingers does not in the normal course of things wind up with a webbed set of fingers . . . they had him almost two months (Tr. 53).
>
> MR. DAVID: Are you thinking about the thigh too?
>
> THE COURT: I didn't hear anything about the thigh.
>
> MR. DAVID: Our suit included the thigh also.
>
> THE COURT: But, I did not hear anything about the thigh. If there is something wrong there I do not know what it is. * * * * *
>
> MR. DAVID: Of course there is something wrong. When skin is taken for a skin graft it doesn't result in the type of thigh he has.
>
> THE COURT: I do not know, maybe you are right, but nobody has said that.

> MR. DAVID: You're not going to admit the Children's Hospital Records then?
>
> THE COURT: I am not going to admit the Children's Hospital Records because they are not relevant. Your suit is with Cafritz Hospital" (Tr.54). * * * Finish putting on your evidence. . ." (Tr. 56)

Whereupon, Dr. Balkissoon was called and testified to conclude the presentation of evidence in the case-in-chief. (Tr. 56-87)

At the conclusion of all the evidence and both sides had rested in the case, the trial judge made the following observation (Tr. 102):

> "THE COURT: Mr. David, I think it is absolutely the most tragic case I have seen in my some 25 years here, but I am a Judge and I took an oath to do the best I could. I do not know anything about medicine and you know that and neither do the ladies and gentlemen of the jury."

The trial judge's attention was directed to the evidence adduced during the trial, counsel for the plaintiffs pointing out that the evidence was such that members of the jury did not have to be learned in the medical profession to pass on the question of negligence, particularly "in light of the doctor's testimony" that the infant's "condition" was such it "could not possibly exist without negligence"; that the doctor had testified that cotton was placed between the fingers by him personally, that the keloids had not formed and that the fingers had healed to the point where it was safe to release the infant from the Hospital; whereas, the mother, supported by two other credible witnesses, testified that when she brought the infant home on the date of his discharge she found the keloids were formed

completely and that the skin graft had healed in a sheet right across the injured hand. There followed some discussion of the standard of care; instructions to the mother to return the infant for further treatment; the "absence of expert testimony," liability of the Hospital and the need to submit the case to the jury on the evidence adduced (Tr. 93-117). These matters were also submitted to the court of appeals in plaintiffs' brief subsequently filed therein on appeal.

REASONS FOR GRANTING THE WRIT

The judgment of the trial court and its affirmance by the District of Columbia Court of Appeals are constitutionally impermissible as violative of both the procedural and substantive due process of law provisions of the 5th and 14th Amendments of the Constitution of the United States.

In this medical malpractice action, where the plaintiffs had duly asserted their statutory and constitutional right to trial by jury, there can be no doubt that there was and is an abundance of evidence in the record which only the jury was constitutionally qualified to determine in arriving at a verdict in the case.[8] See: *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S Ct. 413, *reh. den.* 336 U.S. 940, 69 S. Ct. 744; *B & O R.R. Co. v. Griffith*, 159 U.S. 603, 16 S. Ct. 105; *Phoenix Ins. Co. v. Doster*, 106 U.S. 30.

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8 "In the absence of any statute the common law holds every physician and surgeon answerable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to use reasonable care and diligence, or the failure to exercise his best judgment." 21 R.C.L. 26, p. 379.

Apart from the evidence establishing that the infant's hand was fully healed on the date of his discharge from respondent Hospital, Dr. Balkissoon voluntarily testified that he believed that had he taken proper precautions "*I might have done things to prevent keloid formations with maybe X-ray treatment*" (Tr. 82). (Emphasis supplied). Keloids are not only frightfully disfiguring and vulnerable to infection, but they are very painful and a source of great discomfort. See, testimony of Mrs. Littleton (Tr. 49-50). Also, summary of her testimony on pages 8-10, *supra.* For this condition the jury could have justifiably found Dr. Balkissoon guilty of negligence for failure to use reasonable care and diligence *without the benefit of "expert witness testimony."*

Dr. Balkissoon testified after Mrs. Littleton had given her testimony. In his testimony the respondent doctor rescribed "*the open treatment*" which he administered to the infant *before and after surgery*. Mrs. Littleton also testified that she visited the infant in the Hospital approximately one week after he was admitted and while there she observed the infant's hand was "*wrapped and they had on his hand this little thing with all of his fingers wrapped together*" and there was nothing between or separating his fingers (Tr. 46) and the fingers were "*together*" (Tr. 47). The jury could well infer from this testimony that the infant's fingers and hand became deformed because they were not separated by Hospital personnel or that Dr. Balkissoon lied about the treatment which he testified he followed before and after surgery.

The testimony of Clarrisa Harris and Eva Littleton have the infant coming home from the Hospital with a fully deformed hand, complete with keloids and scarred tissue on the date of discharge; whereas, Dr. Balkissoon's testimony

says that he saw the infant every day in the Hospital from the time he was admitted and discharged from the Hospital, that upon discharge the infant's hand or fingers "had a perfect condition" (Tr. 67). "His fingers looked as well as they possibly could" (Tr. 68), that when he last saw the infant, the infant's fingers had not grown together (Tr. 67).

Obviously, if the jury chose to believe the testimony of the infant's mother and her two female witnesses, rather than the self-serving testimony of Dr. Balkissoon, then the respondent doctor could justifiably be impaled on the standard of care and treatment which he prescribed for himself.

We think it significant to note that Dr. Balkissoon did not produce a single witness to support his version of the case, although he mentioned the names of his professional colleagues. Aside from the infant's mother, no other witness was subjected to cross-examination.

It is the province of the jury to determine the credibility of the witnesses and the weight of the evidence under proper directions in respect to the principles of law applicable thereto. And the court is never justified in directing a verdict except in cases where, conceding the credibility of the witness and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party had not made out a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this, we think, is substantially the doctrine of the adjudged cases that control in the District of Columbia. *Phoenix Ins. Co., supra; Randall v. B & O R.R.*, 109 U.S. 478; *G.T.R. Co. v. Ives*, 144 U.S. 408, 417; *Railroad Company v. Powers*, 149 U.S. 43; *Gardner v. Railroad Co.*, 150 U.S. 349;

Chicago, etc., R.R. Co. v. Lowell, 151 U.S. 209, 217; *B & P R.R. Co. v. Carrington*, 3 App. D.C. 101, 109; *W. Gas L. Co. v. Poore*, 3 App. D.C. 127, 137; *Met. R.R. Co. v. Snashall*, 3 App. D.C. 420, 431; *Weaver v. B & O R.R. Company*, 3 App. D.C. 436, 451; *Warthen v. Hammond*, 5 App. D.C. 167; *Met. R.R. Co. v. Falvey*, 5 App. D.C. 176; *B & P R.R. Co. v. Webster*, 6 App. D.C. 182; *D.C. v. Boswell*, 6 App. D.C. 402; *W & G R.R. Co. v. Wright*, 7 App. D.C. 295; and many others.

The undisputed testimony of the infant's mother, supported by the testimony of Mrs. Littleton, coupled with the testimony of Dr. Balkissoon, fairly established the liability of the respondent Hospital and presents a jury question in the final analysis (Tr. 13-15, 25-26, 30; 48; 57-58).[9]

But there is still another bit of "*testimony evidence*" which establishes beyond all cavil the outer limits to which the trial judge ventured to *invade the province of the jury*, manifesting the clearest and direst violations of constitutional rights as can be portrayed: *Dr. Balkissoon himself testified* that the infant's condition was due to "*medical neglect*" (Tr. 76), and "*When I found that out I was shocked. I was in a state of shock*" (Tr. 77). (All emphases supplied). It will also be recalled that Dr. Balkissoon in his testimony *consistently insisted* that the infant's injury was "*healed*" on the date of his discharge (Tr. 67-68, 73, 75-76).

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[9] At a second trial, respondent Hospital will have an opportunity to present evidence on the issue of liability, a course which it elected not to pursue during the former "*trial*" proceedings.

But *Dr. Balkissoon,* testifying under oath, tells the court and jury that he has a *theory,* based on the word "*IF*" (Tr. 76-77), the *theory* being that the infant's "*family*" was responsible for the "*medical neglect*" *because the infant was not returned to the Hospital for "more treatments.*" In order to accommodate his theory, based on an "*iffy possibility,*" he suggested that "*if there are any raw surfaces between the fingers they would tend to stick if they are not made to move and this is my theory of what happened in this instance*" (Tr. 76).[10] While there is abundant testimony from respondent doctor that he examined the infant's injured hand before discharge and that the hand and fingers were in perfect condition and looked as well as they possibly could (Tr. 67-68; cf. 73, 75), there is no evidence or testimony showing that Dr. Balkissoon examined and found any "*raw surface*" or "*wet areas*" between the infant's fingers on or near the date the infant was discharged. In any event, the jury could infer from Dr. Balkissoon's own testimony that he alone (or jointly with respondent Hospital) was guilty of "*medical neglect,*" which was the proximate cause of the infant's condition (described by the trial judge as "*the most tragic case I have seen in my some 25 years here*") and which "*shocked*" Dr. Balkissoon and placed him "*in a state of shock.*"

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10 Even if the jury should accept Dr. Balkissoon's *theory* of the case, this would afford no comfort to the defendants, inasmuch as the jury could reasonably find from a consideration of all the evidence that Dr. Balkissoon's failure to check out the "*raw surface*" or "*wet areas*" between the fingers of the 18-month old infant's hands before discharging him, constituted an omission of reasonable care and diligence which resulted in the injuries complained of on the left hand.

In sum, we are impelled to the inescapable conclusion that both the trial judge and the appellate court *ignored or rejected* the testimony of Annie Mae Harris, Clarrisa Harris and Eva Littleton, which was favorable to the plaintiffs, and accepted the solitary testimony of Dr. Balkissoon (thought to be favorable to himself) and his "*theory*" of the case as being true. Under the cases previously cited it is quite apparent that the action taken by the trial judge was arbitrary and contrary to law and that the sanction of such action by the court of appeals is judicially untenable.

Having duly demanded trial by jury, plaintiffs were constitutionally entitled to have the jury consider the testimony of all the witnesses, including the testimony of those witnesses whose testimony fully supported plaintiffs' contentions and legal position in the case. Obviously, by invading the province of the jury, the trial judge was able to direct the verdict against the plaintiffs as herein complained of.

From the plain facts of the case, and upon consideration of the cases cited *supra,* there remains no room for doubt that the established and well settled law of the District of Columbia required the trial court to submit the instant case to the jury which had been duly empanelled to try it. The failure of the trial court to submit the case to the jury for its verdict under appropriate instructions was a denial of due process of law and deprived petitioners of the equal protection of the laws in derogation of the 5th and 14th Amendments to the Federal Constitution. Moreover, it was error for the District of Columbia Court of Appeals to utilize the doctrine of *res ipsa loquitur* to affirm the judgment of the trial court for the reasons just advanced.

CONCLUSION

For the foregoing reasons certiorari should be granted, the judgment of the court below should be reversed, and the case remanded with directions to reinstate it on the docket trial calendar for jury trial without inordinate delay.

Respectfully submitted,

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APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9710

ANNIE MAE HARRIS, ET AL., APPELLANTS,

v.

CAFRITZ MEMORIAL HOSPITAL, ET AL., APPELLEES.

Judgment entered this date

Appeal from the Superior Court of the District of Columbia

(Argued March 11, 1976 Decided September 20, 1976)

King David for appellants.

F. Wainwright Barnes for appellee Cafritz Memorial Hospital.

Thomas J. Scanlon for appellee Basdeo Balkissoon, M.D.

Before KERN, GALLAGHER and MACK, *Associate Judges.*

PER CURIAM: This is a medical malpractice action in which the trial court directed a verdict in favor of appellees (defendants) at the close of appellants' (plaintiffs') case in chief. On appeal, appellant argues that the court erroneously refused to invoke the doctrine of *res ipsa loquitur*. We affirm.

Appellant Ms. Annie Mae Harris instituted this action for her five-year-old son Michael to recover damages for injuries to the child's hand and thigh allegedly resulting from treatment provided by appellees, Dr. Basdeo Balkissoon and Cafritz Memorial Hospital. Michael was taken to Cafritz Hospital on July 17, 1972, after his left hand was severely burned by scalding water. He remained in the hospital and received treatment for the burn from Dr. Balkissoon. Seventeen days after his admission, a skin graft was performed on his hand with a segment of skin which had been removed from his thigh. The child continued to receive treatment and therapy until he was discharged from the hospital on September 10, 1972. At that time, appellant was instructed to bring Michael back to the hospital approximately twice a week for physical therapy, and an appointment with Dr. Balkissoon was made for one week later. Appellant did not take the child back to the hospital for therapy, nor did she return to Dr. Balkissoon, despite repeated phone calls from his office.[1] Michael received no further treatment until he was taken to Children's Hospital for a rash eight months later. There, doctors discovered that the skin between his fingers had grown together, making him unable to move his hand, and that keloids, or excessive scar tissue, had formed on his thigh.

At trial, appellant's evidence consisted of her own testimony and testimony from her mother, her niece and Dr. Balkissoon. Appellant first testified that when Michael left Cafritz Hospital, his hand was in a splint which did not separate his fingers, that his hand had not

[1] Appellant testified that she did not return the child for treatment because of financial problems and the pressures of work. She subsequently testified that she thought the appellees performed a bad job and she wanted nothing more to do with them.

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healed, and that he could move his fingers. Appellant's fifteen-year-old niece testified that the baby's hand was not in a splint and his fingers were "stuck together" when he came home from the hospital. Appellant's mother testified that the baby's hand was in a splint which did not separate the fingers and that she thought the keloids had also formed at that time. The next witness, Dr. Balkissoon, testified that he used the "open treatment" in dealing with skin loss, that the child's hand had not completely healed when he was discharged, but that it was in good condition, the skin separating the fingers had not healed improperly, and the child's thigh was healing well. He also stated that he instructed appellant, among other things, to remove the splint intermittently and to allow the child to move and flex his hand. The doctor attributed the condition of the hand to Michael's failure to receive continued treatment or physical therapy and to neglect at home. Appellant was then recalled and contradicted her earlier testimony, stating that the child's hand had completely healed when she took him home from the hospital and was in an immobile condition, similar to that at the time of trial.

At the close of appellant's evidence, the trial court granted appellees' motion for a directed verdict on the ground that appellant had failed to provide any evidence of the "standard of care" applicable to the treatment challenged and had failed to show that the child's injury was caused by such treatment. Appellant contends that expert testimony was not required because the doctrine of *res ipsa loquitur* is applicable.

In a medical malpractice case, expert testimony establishing a failure to meet the appropriate standard of

care[2] is unnecessary if the evidence is sufficient to allow application of the doctrine of *res ipsa loquitur*. *Smith v. Reitman*, 128 U.S.App.D.C. 352, 389 F.2d 303 (1967); *Quick v. Thurston*, 110 U.S.App.D.C. 169, 290 F.2d 360 (1961); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39 at 227 (4th ed. 1971). Under that doctrine, the jury is permitted to infer negligence if the consequences of professional treatment are those which ordinarily would not occur when due care is exercised. *Lathon v. Hadley Memorial Hospital*, D.C.App., 250 A.2d 548, 549 (1969); *Burke v. Washington Hospital Center*, 154 U.S. App.D.C. 253, 254, 475 F.2d 364, 365 (1973); *Brown v. Keaveny*, 117 U.S.App.D.C. 117, 118, 326 F.2d 660, 661 (1963). Where laymen can say, as a matter of common knowledge and observation, that the type of harm would not ordinarily occur in the absence of negligence, the jury is allowed to infer negligence without expert testimony being presented. *Haven v. Randolph*, 161 U.S.App. D.C. 150, 151, 494 F.2d 1069, 1070 (1974); PROSSER, THE LAW OF TORTS, *supra* at 227.[3] However, if a case involves the merits and performance of scientific treatment, complex medical procedures, or the exercise of professional skill and judgment, a jury will not be qualified

[2] A physician undertakes to exercise that degree of care and skill ordinarily exercised by members of the medical profession. *Quick v. Thurston*, 110 U.S.App.D.C. 169, 290 F.2d 360 (1961).

[3] *See, e.g., Burke v. Washington Hospital Center, supra* (failure to remove surgical sponge); *Washington Hospital Center v. Butler*, 127 U.S.App.D.C. 379, 384 F.2d 331 (1967) (fall from rotating X-ray table); *Young v. Fishback*, 104 U.S.App.D.C. 372, 262 F.2d 469 (1958) (failure to remove gauze during surgery). *But see Johnston v. Rodis*, 102 U.S. App.D.C. 209, 251 F.2d 917 (1958) (fractured arm during electric shock treatment, *res ipsa loquitur* inapplicable).

to determine whether there was unskillful or negligent treatment without the aid of expert testimony.[4] As a basis for invoking the doctrine of *res ipsa loquitur* in this type of situation, the plaintiff must at least present some expert opinion that the event will not usually occur if due care is used. *Raza v. Sullivan*, 139 U.S.App.D.C. 184, 186-87, 432 F.2d 617, 619-20 (1970), *cert. denied*, 400 U.S. 992 (1971); *Smith v. Reitman*, *supra* at 353, 389 F.2d at 304; *Quick v. Thurston*, *supra* at 172, 290 F.2d at 363; *Bardessono v. Michels*, 91 Cal.Rptr. 760, 478 P.2d 480, 485 (1970); PROSSER, THE LAW OF TORTS, *supra* at 227 n.1.

When viewed in the light most favorable to appellant, the evidence in this case shows that the child's hand and thigh may have healed improperly at the time he left the hospital. However, sophisticated, complex and continuing treatment is involved in restoring severely burned skin tissue, particularly on an infant. Here we cannot say that it is a matter of common knowledge that the deformity ordinarily would have resulted only if appel-

[4] As Dean Prosser explained:

> Since a physician or surgeon normally undertakes only to exercise the skill and care common to the profession, there usually is not enough in a mistaken diagnosis alone, or the unfortunate choice of the wrong method of treatment, or the kind of accident or undesirable result which happens in spite of all reasonable precautions, to show the necessary lack of skill or care. What this means is that ordinarily laymen are not qualified to say that a good doctor would not go wrong, and that expert testimony is indispensable before any negligence can be found. [Footnotes omitted.] [PROSSER, THE LAW OF TORTS, *supra* at 226-27.]

See also Haven v. Randolph, supra; Brown v. Keaveny, supra; Rodgers v. Lawson, 83 U.S.App.D.C. 281, 170 F.2d 157 (1948).

lees had been negligent in some way. At the very minimum, an expert opinion to this effect was required to supply a foundation for the doctrine of *res ipsa loquitur*.

The facts and inferences justifying the invocation of the doctrine can sometimes be found in overall evidence (including testimony of the defendant physician) rather than in evidence provided by a medical expert. *See Haven v. Randolph, supra; Brown v. Keaveny, supra* at 119, 326 F.2d at 662 (Wright, J., dissenting). However, in this case, Dr. Balkissoon testified that he followed standard procedures in performing the skin graft and providing subsequent treatment. He was not questioned about other possible methods of treatment, or more important, about the possibility or probability of deformity occurring if accepted treatment is properly administered. When questioned about the child's thigh, the doctor observed that the child was "[a]pparently a keloid former" and stated that if he had known this he might have tried to prevent keloid formation with X-ray treatment. However, he also testified that there is no way to determine who will be a keloid former.[5] Nothing in this testimony provided the requisite foundation for *res ipsa loquitur*. In considering appellant's evidence, the jury could only have speculated as to any possible negligence on the part of appellees.

Affirmed.

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[5] The doctor was not asked about keloidal tissue on the child's hand, and the record does not provide any indication of whether the condition of the hand is due to keloid formation.